APPENDIX A — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION FILED JUNE 10, 2004

INTHE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

Case No. 2:02CV-0204TC

THE SOCIETY OF LLOYD'S

Plaintiff,

vs.

WALLACE R. BENNETT, GRANT R. CALDWELL, CALVIN P. GADDIS, DAVID L. GILLETTE, STEPHEN M. HARMSEN, KELLY C. HARMSEN, JAMES R. KRUSE, EDWARD W. MUIR, and KENT B. PETERSEN,

Defendants.

ORDER

On May 13, 2004, a hearing was held on all pending motions before the Court in this matter. In attendance were Michael N. Zundel and Thomas R. Barton, counsel for Plaintiff The Society of Lloyd's ("Lloyd's"); Franklin Bennett and David Bennett counsel for Defendant Wallace R. Bennett ("Bennett"), who was also present; and Steven A. Wuthrich, counsel for Defendants Stephen M. Harmsen and Kelly C. Harmsen. Based on the papers filed by the parties, the argument presented at the hearing, additional materials as noted below, and good cause appearing therefor,

Appendix A

THE COURT ENTERS THE FOLLOWING ORDERS as to each of the following motions:

1. *Bennett's Amended Motion Challenging Diversity of Citizenship Jurisdiction of the Court, dated March 4, 2004* and *Bennett's Motion to Determine that the Absence of Diversity of Citizenship Jurisdiction Warrants Dismissal of this Case, dated March 19, 2004.* These motions are both denied for the reasons set forth in Lloyd's opposing memoranda. Specifically, the Court finds that Lloyd's is an English corporation. Therefore, as a matter of law, Lloyd's is a citizen of England. None of the defendants in this matter are citizens of England. Therefore, diversity jurisdiction is proper pursuant to 28 U.S.C. § 1332(a)(2). Furthermore, the Court finds that Equitas Reinsurance, Limited ("Equitas"), which is the assignor of Lloyd's underlying claims against the defendants, is also a citizen of England. Therefore, with reference to 28 U.S.C. § 1359, the assignment from Equitas to Lloyd's is not collusive and does not invalidate the diversity jurisdiction of this Court. The Court also finds that Lloyd's action against Bennett is not a "direct action against [an] insurer," and that therefore the diversity jurisdiction of this Court is not invalidated pursuant to the exception identified in 28 U.S.C. § 1332(c)(1).

2. *Lloyd's Motion to Strike Certain Exhibits to Bennett's Memorandum in Support of Amended Motion Challenging Diversity Jurisdiction of the Court, dated March 19, 2004.* This motion is denied as being moot.

3. *Bennett's Motion to Set Aside the Final Judgment Under Rule 60(b), dated March 19, 2004.* This motion is

denied. The Court finds that Bennett has not met his burden of demonstrating, by clear and convincing evidence, that Lloyd's has committed any fraud or misrepresentation that would warrant setting aside the Judgment Against Defendant Bennett.

4. *Bennett's Motion for Protective Order, dated May 10, 2004.* This motion is denied. The Court notes that it has previously denied Bennett's motion for stay pending appeal and for relief from posting supersedeas bond, and that Bennett has not posted a supersedeas bond. Under the circumstances, the grounds set forth by Bennett in his motion are insufficient to warrant an order restraining Lloyd's current collective efforts.

5. *Lloyd's Motion to Hold Defendant Wallace R. Bennett in Civil Contempt, dated January 26, 2004* ("Motion for Civil Contempt"). This motion is granted in part and denied in part for the reasons set forth below. Pursuant to 28 U.S.C. § 636(e)(6), Magistrate Judge Nuffer entered an Order Certifying Facts of Contempt, dated March 23, 2004. This order was based on Bennett's refusal to comply with Magistrate Judge Nuffer's Order Granting Motion to Compel, dated December 18, 2004, which Bennett admitted during the hearing before Magistrate Judge Nuffer on February 24, 2004. However, based on the representations of Bennett's counsel at the May 13, 2004, hearing, the Court understands that Mr. Bennett is now willing to comply with the Order Granting Motion to Compel. Therefore, the Motion for Civil Contempt, to the extent that it sought to incarcerate Bennett until he complied with the Order Granting Motion to Compel, is denied without prejudice, subject to Mr. Bennett's full

compliance with this Order. However, the Court finds that Bennett's conduct, up until the May 13, 2004 hearing, was in violation of theOrder Granting Motion to Compel. Therefore, to the extent that the Motion for Civil Contempt sought a recovery of reasonable attorneys' fees, the motion is granted.

IT IS HEREBY ORDERED that Lloyd's file and serve an affidavit of expenses, including reasonable attorneys' fees, incurred in conjunction with the Motion for Civil Contempt, within ten days of the entry of this Order. Bennett shall have ten days after the service of the affidavit to submit a response thereto.

IT IS FURTHER ORDERED THAT Bennett shall fully and completely respond to all outstanding written discovery, and deliver copies of responsive documents to Lloyd's counsel's offices, no later than Friday, June 18, 2004. No later than May 21, 2004, Bennett shall also provide Lloyd's counsel, in writing, five business days on which he will be available for deposition between June 28 and July 9, 2004. Lloyd's shall select the day (or days) on which the deposition shall occur. The aforementioned deadlines will not be affected by motions or requests made in the interim, and will not be altered except by order of the Court entered prior to the applicable deadlines. If Bennett fails to adhere to any of the aforementioned requirements, Lloyd's is directed to contact the Court immediately.

DATED this 9th day of June, 2004.

Appendix A

BY THE COURT:

s/ Tena Campbell
Tena Campbell
U.S. DISTRICT COURT JUDGE

APPROVED AS TO FORM:

_____

Attorney for Wallace D. Bennett

Mr. Bennett has objected to this proposed order. His objections are without merit and are hereby rejected.

Tena Campbell
6-9-04

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION FILED MAY 21, 2003

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CIVIL NO. A-03-CA-9 JN

THE SOCIETY OF LLOYD'S

v.

CHARLES WILLIS BILA

ORDER

Before the Court are Defendant's Motion to Deny Recognition of Foreign Judgment (Clerk's Doc. No. 8), Defendant's 12(b)(1) Motion to Dismiss Notice of Filing of Foreign Country Judgment, and, in the Alternative, Request for Leave to Conduct Jurisdictional Discovery (Clerk's Doc. No. 9), Plaintiff's Opposition to Defendant's 12(b)(1) Motion to Dismiss Notice of Filing of Foreign Country Judgment (Clerk's Doc. No. 10), and Plaintiff's Motion for Recognition of Foreign Judgment and Opposition to Defendant's Motion to Deny Recognition of Foreign Judgment (Clerk's Doc. No. 11). Having considered the pleadings, case file, and applicable law, the Court enters the following Order.

Defendant contends that the Court lacks subject-matter jurisdiction in the instant case because Plaintiff and Defendant are not diverse parties. The Court disagrees.

Appendix B

Defendant is a Texas resident. Plaintiff is an English corporation. *Society of Lloyd's v. Turner*, 303 F.3d 325, 326-27 (5th Cir. 2002); *Society of Lloyd's v. Ashenden*, 233 F.3d 473, 475 (7th Cir. 2000). As Plaintiff is not incorporated in Texas and does not have its principal place of business in Texas, the parties are diverse, and, accordingly, the Court has subject-matter jurisdiction in this case. *See Howery v. Allstate Ins. Co.*, 243 F.3d 912, 920 (5th Cir. 2001).

Defendant's substantive arguments relating to theMotion to Deny Recognition of Foreign Judgment are that the judgment is repugnant to Texas public policy and was obtained in violation of due process of law.[1] The Fifth Circuit Court of Appeals has expressly rejected both arguments on these identical facts. *Turner*, 303 F.3d at 330-33. Needless to say, this Court will as well.[2]

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1. Defendant also makes the related argument that the Names, a group to which Defendant belongs, were not allowed to assert the defense of fraud in the English proceedings, and, as such, the judgment should not be recognized. This argument can only be understood as a subset of the due-process argument in which Defendant is attempting to object in the collection phase of the case to the procedures used in the merits phase; this argument has been squarely rejected. *See Ashenden*, 233 F.3d at 477-78.

2. The Court would entertain a motion from Plaintiff for attorneys' fees and/or sanctions under FED. R.CIV. P. 11. At first blush, it appears that the only way the arguments presented by Defendant could pass muster under Rule 11 is if Defendant plans to pursue them all the way to the United States Supreme Court (assuming a request for an *en banc* hearing by the Fifth Circuit is either denied or the *en banc* hearing produces the same result as *Turner*). Anything

(Cont'd)

Appendix B

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Defendant's Motions (Clerk's Doc. Nos. 8 & 9) are hereby DENIED.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Plaintiff's Motion for Recognition of Foreign Judgment (Clerk's Doc. No. 11) is hereby GRANTED.

SIGNED AND ENTERED this 21st day of May, 2003.

s/ James R. Nowlin
JAMES R. NOWLIN
CHIEF UNITED STATES DISTRICT JUDGE

(Cont'd)

less than this almost surely falls short of the strictures of FED. R. CIV. P. 11(b)(2). Assuming this is what Defendant has planned, it would weigh heavily in Defendant's favor in the Court's assessment of the merits of any motion for fees or sanctions by Plaintiff if Defendant represents this to the Court *and* follows through on those representations. If not, Defendant had better produce some novel, compelling arguments as to why he does not deserve to be sanctioned.

APPENDIX C — ORDER GRANTING MOTION FOR RECONSIDERATION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO FILED SEPTEMBER 9, 2004

Civil Action No. 02-RB-1959 (OES)

[Consolidated with Civil Action Nos. 02-RB-1960, 02-RB-1961, 02-RB-1962, 02-RB-1963, 02-RB-1979]

THE SOCIETY OF LLOYD'S,

Plaintiff,

v.

JOHN MEACHEM SOMMER,

Defendant.

ORDER GRANTING MOTION FOR RECONSIDERATION

Blackburn, J.

Pending is plaintiff's motion for reconsideration of the court's *sua sponte* dismissal of the above-captioned action for failure to satisfy the elements of diversity jurisdiction as pled in the case. In its dismissal order, the court found that the "names" who comprise plaintiff Society of Lloyd's (Lloyd's) "syndicates" are Colorado residents, thereby defeating diversity of citizenship between plaintiff and defendant, a Colorado resident. The dismissal order is premised upon a line of cases represented by ***Indiana Gas***

Appendix C

***Co. v. Home Insurance Co.*, 141 F.3d 314 (7th Cir. 1998)**, which, similar to this court's ruling, found an absence of diversity between defendants and plaintiff members of Lloyd's syndicates of the same state. Plaintiff's motion prompted additional research by the court, which led to the court's perusal of a later Seventh Circuit opinion, ***Society of Lloyd's v. Estate of McMurray*, 274 F.3d 1133 (7th Cir. 2001).**

In ***Estate of McMurray*** the court distinguishes a case such as ***Indiana Gas Co.***, where Lloyd's syndicates are a party plaintiff and are treated as partnerships for purposes of the diversity analysis, from cases such as this one, where it is Society of Lloyd's itself, a corporation incorporated under the laws of Great Britain, that is a party plaintiff. ***Estate of McMurray*, 274 F.3d at 1134 n.1.** Where a "name," or member, of a plaintiff Lloyd's syndicate shares citizenship with a defendant party, diversity is not present.[1] Where, however, Society of Lloyd's is a plaintiff in an action against a citizen of the United States, diversity of citizenship is present and federal jurisdiction is appropriate. The above-captioned matter is an ***Estate of McMurray*** type of case and not an ***Indiana Gas Co.*** type of case.[2]

---

1. An instructive analysis of Lloyd's unique organizational structure in the context of a federal diversity jurisdiction determination is found in ***Lowsley-Williams v. North River Insurance Company*, 884 F. Supp. 166 (D.N.J. 1995).**

2. *See also* ***Society of Lloyd's v. Turner*, 303 F.3d 325 (5th Cir. 2002)**, and ***Society of Lloyd's v. Ashenden*, 233 F.3d 473 (7th Cir. 2000)**, where federal courts exercised diversity jurisdiction in cases involving Lloyd's as a party plaintiff, although jurisdiction was not challenged by the defendants or addressed by the courts.

Appendix C

THEREFORE IT IS ORDERED as follows:

1. That **Plaintiff's motion for Reconsideration [#47]** filed July 24, 2003, is **GRANTED;**

2. That my **Order Dismissing Plaintiff's Complaint and Defendant's Counterclaims for Lack of Jurisdiction [#45]** filed June 19, 2003, is **RESCINDED;** and

3. That **Plaintiff's Unopposed Motion To Permit Withdrawl Of Motion For Reconsideration And Entry Of Judgment** filed September 8, 2004, is **DENIED AS MOOT.**

Dated September 9, 2004, at Denver, Colorado.

BY THE COURT:

s/ Robert E. Blackburn
Robert E. Blackburn
United States District Judge

Supreme Court, U.S.
FILED
JUL 29 2005
OFFICE OF THE CLERK

(3)

No. 04-1731

IN THE

Supreme Court of the United States

WALLACE R. BENNETT,

Petitioner,

v.

THE SOCIETY OF LLOYDS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF

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I. JURISDICTIONAL REQUISITES NOT MET

To sue under 28 U.S.C. § 1332, Congress has determined that there must be "complete diversity of citizenship." *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 377 (1978). Complete diversity must be manifest "as a threshold matter". *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 95 (1998). "Standing to sue is part of . . . what it takes to make a justiciable case." *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990).

In the case at bar, Wallace Bennett signed a seminal Agency Agreement having extensively detailed rights and duties with Edward Williams Coutts & Partners, Ltd., an unincorporated British insurance agency. [*See* Bennett Petition for Certiorari, pp. 13-15] Thereafter Lloyds of London caused a sequence of unilateral "assignments" whereby Coutts was wholly displaced by "Substituted agent" Castle Agency; followed by "AUA9"; then by "Equitas"; then to the "Society of Lloyds", the designated unincorporated-society-and-also corporation plaintiff herein. [Docs. 32, 178; Doc. 244, pp. 114-119].

Wallace Bennett became a **constituent Member** of "The Society" (#24021C) and a "Name" in Lloyds "community". [Compare this factually with Lloyds assertion that there exists "complete diversity" between "The Society and Bennett".]

Under the applicable law set forth in **II.** below, requisite § 1332 complete diversity is not clearly met; the Society should not be regarded as having unquestioned standing to sue through these assignments and as if it were a typical corporation; the case should be dismissed for failure of fundamental jurisdiction.

II. Determinative Facts and Law

Section 1332(a)(2), 28 U.S. Code specifically requires foreign plaintiffs to be "citizens or subjects of a foreign state. . . ." "The Society of Lloyds", designated collection agent for a consortium, is not itself comprised, even primarily, of "subjects of a foreign state". This failure should have been revealed by a non-U.S. government corporate disclosure statement required of Lloyds by Supreme Court Rule 30.6.

For diversity determinations, American case law deems an unincorporated association to be "a citizen of every state in which its members reside". [Hence requisite § 1332 diversity is not present.] *Hummel v. Townsend*, 883 F.2d 367, 369 (5th Cir. 1989). *Carden v. Arkoma Associates*, 494 U.S. 185 (1989).

The Seventh Circuit Court in *Indiana Gas Company, Inc. v. Home Insurance Company*, 141 F.3d 314, 316 (1998) held that complete diversity was lacking in that Lloyds case and dismissed the litigation pronouncing this policy:

> This approach reflects a strong reluctance to extend the diversity jurisdiction by judicial interpretation – a reluctance that has characterized the Supreme Court's jurisprudence ever since *Strawbridge* held that complete diversity is essential.

Id. at 319. [Quoted therein was *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934):

> [E]very federal appellate court has a special obligation to "satisfy itself not only of its own jurisdiction; but also that of the lower courts in a cause under review", even though the parties are prepared to concede it.]

Kramer v. Caribbean Mills, Inc., 394 U.S. 823, 827-829 (1969) indicated factors that exclude jurisdiction recognition of successive assignments, especially among entities as to which truly independent status and consideration are questionable:

> . . . there can be little doubt that the assignment was for purposes of collection. . . . ". . . motivated . . . to make diversity jurisdiction available. . . ."
>
> If federal jurisdiction could be created by assignments of this kind, . . . a vast quantity of ordinary contract and tort litigation could be channeled into the federal courts at the will of one of the parties. Such "manufacture of Federal jurisdiction" was the very thing which Congress intended to prevent when it enacted § 1359 and its predecessors.

To this effect also see *Dweck v. Japan CBM Corporation*, 877 F.2d 790, 792-793 (9th Cir. 1989).

Prudential Oil Corp. v. Phillips Petroleum Co., 546 F.2d 469, 475 (2nd Cir. 1976) concluded:

> . . . it was suggested by the Supreme Court almost a century ago that an intercorporate assignment between a parent and its subsidiary should be treated as presumptively ineffective for jurisdictional purposes."

An evident absence of consideration especially taints the substantive *bona fides* of Lloyds' "assignments" herein. *See* 14 Wright, Miller & Cooper, *Federal Practice and Procedure* § 3639, at p. 109 (2d ed. 1985).

III. The Deeper problem of Enforceability In Utah of This Foreign-Nation [English] Judgment

Although this particular 28 U.S.C. § 1332 case should be dismissed outright for lack of a clear showing by Lloyds of standing to sue and complete diversity jurisdiction, the history of this important international litigation provides a timely context for the High Court to deal with entwined federal – state relationships.

Two principal vectors impinge: a concern to pay special deference to agreed English contract clauses, processes and adjudications / opposed to a Congressional mandate that except in "federal – question" cases [28 U.S.C. § 1331], the law and equity of the involved forum *state* "shall be **regarded** as rules of decision."

The *ratio decidendi* of the Tenth Circuit opinion at bar seems: "We have already determined that the English judicial system is procedurally above reproach" [Op. p. 38]; and that "We have no choice under *Hilton* [c.f. analysis in Bennett Petition for Cert. p. 10] . . . "but to examine the entirety of the foreign judicial **system**, and not the particularity of individual judgments." [Op. p. 32]

The Tenth Circuit did qualify the conviction of its overall endorsement: "English courts found Lloyds guilty of negligence with respect to their Names" [Op. p. 10] and "Lloyds had been guilty of serious negligence and/or fraud" [Op. p. 8].

Clauses that prospectively disenable parties from pursuing statutory remedies in international cases have been questioned by the Supreme Court: *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) at p. 637, n. 19, ¶ 2 quoted in *Vimar Seguros Y Reaseguros, S. A. v. M/V Sky Reefer*, 515 U.S. 528 (1995). The Supreme Court stated:

> . . . 1 Restatement (Third) of Foreign Relations Law of the United States § 482(2)(d) (1986) ("A court in the United States need not recognize a judgment of the court of a foreign state if . . . the judgment itself is repugnant to the public policy of the United States"). Were there no subsequent opportunity for review and **were we persuaded that "the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies . . . , we would have little hesitation in condemning the agreement as against public policy."**

Vimar Seguros, at p. 540, ¶ 2. [Emphasis added.]

Under The Rules of Decision Act, 28 U.S.C. § 1652, state law – not federal, not foreign – should govern the resolution of the legal and equitable claims and defenses of true divergent parties in a § 1332 action. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938); *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945); and *Wainwright v. Goode*, 464 U.S. 78 (1983): "The views of the State's highest court with respect to state law are binding on the federal courts." *Id.* at p. 84, ¶ 2; "the petition for certiorari is granted, the judgment of the Court of Appeals . . . is reversed. . . ." *Id.* at p. 87, ¶ 3.

The late eminent constitutional authority Charles Alan Wright put it this way:

> The federal court must keep in mind . . . that its function is . . . to choose the rule it believes the state court, from all that is known about its methods in reaching decisions, is likely in the future to adopt.

Wright, LAW OF FEDERAL COURTS (5th ed. 1994) at p. 397.

Current Utah Supreme Court Chief Justice Christine M. Durham presciently emphasized in an article published in 1989 that a State may afford greater protections than under similarly worded federal statutes. *See* Bennett Petition for Certiorari, p. 28.

The Tenth Circuit Court did not understandingly apply this fundamental tenet of federal – state jurisprudence, and ignored what should have been controlling state law.[1] The Supreme Court declared in *United States v. Rutherford*, 442 U.S. 554, 555 (1979):

> Under our constitutional framework, federal courts do not sit as councils of revision empowered to rewrite Legislation in accord with their own conceptions of prudent public policy.

Whatever some federal court somewhere might determine, for example, about waiverability of federal securities act protections, the Utah Uniform Securities Act is unmistakable: there can be no waiver of compliance with its investor protections [UTAH CODE ANN. § 61-1-22(9)], and no suit can be brought in Utah on any investment contract that is in violation of the statute [UTAH CODE ANN. § 61-1-22(8)]. Other outcome-altering statutes, UTAH CODE ANN. 78-22b-107(3) and 78-22b-114, should also have been looked at relative to ordering enforcement executions in this state. The questions were not certified to the Utah Supreme Court, although motions for such were made.

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[1] "A federal court sitting in diversity applies the choice of law rules of the state in which it sits." *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941). *Erie* established that there was to be no general "federal common law." Even Congress has no power to declare substantive rules of common law applicable in a state; and only Congress can determine lower federal court subject-matter jurisdiction. [As with many other states, Utah has not adopted the *Uniform Foreign - Money Judgments Recognition Act*. (10th Cir. Op. p. 31)]